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No. 07-1442

Supreme Court, U.S.
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In The

Supreme Court of the United States

STUART L. STEIN, ESQUIRE,

Petitioner,

v.

DISCIPLINARY BOARD OF THE
SUPREME COURT OF NEW MEXICO,

Respondent.

**On Petition For A Writ Of Certiorari To
The Supreme Court Of New Mexico**

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

References to the Brief in Opposition will be by pages (Br.Opp. page XX) and its Appendix by designated letter and page (Br.Opp. Exhibit A, App. XXX).

References to Petition for a Writ of Certiorari will be by pages (Pet.Writ.Cert. page XX) and its Appendix by designated letter and page (Pet.Writ.Cert., Exhibit A, App. XXX).

References to the appendix material in this Reply will be by designated letter and page (Reply Exhibit FF, App. X).

REPLY BRIEF

STATEMENT OF THE CASE.

Respondent submits a 14-page alternative Statement. Br.Opp. pages 1 to 14. Petitioner's objections are outlined below.[1]

Complaint by District Judge.

Respondent presents the complaint letter from the New Mexico District Court Judge. Br.Opp. page 1; Br.Opp., Exhibit A, App. 1. Petitioner's response sought assurances that should charges be filed discovery would be available. Br.Opp. page 2; Br.Opp., Exhibit C, App. 21. Respondent condemns this request. Br.Opp. page 2.

By omission, Respondent indicates that Petitioner did not substantively respond. Br.Opp. page 2. However, Petitioner did respond on October 14, 2005. Reply Exhibit FF, App. 1. It pointed out:

> If Judge Vanzi felt that any actions of this writer were in violation of any order entered by the Court, a Motion for Contempt should have been filed by the other attorneys in the case or Judge Vanzi should have issued her own Order to Show Cause why this writer should not be held in contempt. No attorney filed any such motion and Judge Vanzi did not issue any Order to Show Cause.

Id. at App. 2.

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[1] Petitioner adds subject headings.

No Charge of Disobeying Court Order.

The Specification of Charges did not charge Petitioner with disobeying a court order. Pet.Writ.Cert., Exhibit BB, App. 194. The logical conclusion is that the Order violation claim was investigated and not substantiated. As noted in the Petition:

> Petitioner was never put on notice before the proceedings that he was on trial for violation of court orders. fn. 5
>
> > fn.5 The Chair of the Hearing Committee agreed on the record that there was no charge of violating a court order in the Specification of Charges, but lack of a written charge did not stop that ultimate finding in the Opinion [of the New Mexico Supreme Court] and disbarment . . .

Pet.Writ.Cert. page 17, footnote included. These facts were not traversed. Sup.Ct.Rule 15.2.

Respondent claims it followed N.M.R.A.17-309 in filing the Specification of Charges. Br.Opp. page 3. It did so incorrectly.

Rule 17-309 (2006) contemplates separate counts for each charge. Br.Opp., Exhibit D, App. 23 (" . . . The specification of charges shall contain: (1) a brief and plain statement of the charge, ***or if more than one, each of the separate charges*** of professional misconduct asserted against the respondent-attorney;" emphasis supplied). There was no separation of charges.

Respondent claims that the Specification of Charges " . . . tied the allegations of violative conduct to the specific rules . . . violated." Br.Opp. page 3. A plain reading of the Specification of Charges belies this contention. Pet.Writ.Cert., Exhibit BB, App. 194. The inability to understand what conduct violated what specific Rule of Professional Conduct was raised as a Due Process violation in the Motion to Dismiss. Pet.Writ.Cert. page 5; Pet.Writ.Cert., Exhibit AA, App. 188.

Respondent writes:

> The rules also required Petitioner to admit or deny the charges, ***to provide any matter in mitigation***, and to identify witnesses . . . Petitioner chose not to comply with the rules and never provided any relevant or material evidence . . . that could explain his conduct. He also failed to designate any ***"matter in mitigation."***

Br.Opp. page 4, emphasis supplied, citing N.M.R.A.17-310 (2008) Br.Opp., Exhibit F, App. 40. This Rule was amended on January 15, 2007. The superceded rule required an accused lawyer to provide or include:

> (2) any matter in mitigation ***in connection with any admitted violations***;

N.M.R.A.17-310 (2006), emphasis supplied. Reply Exhibit GG, App. 5. Petitioner did not admit any violations and therefore did not include matters in mitigation.

Denial of All Discovery.

Respondent chastises Petitioner's failure to request discovery until his Motion to Dismiss was ruled upon. Br.Opp. page 4. Requesting discovery after pleadings are closed avoids duplication and expense.

Two discovery motions were filed. Pet.Writ.Cert., Exhibit V, App. 148; Exhibit R, App. 115. They were filed under N.M.R.A.17-311 (2006). Pet.Writ.Cert. page 4. The rule requires a "showing of need." *Id.* Petitioner showed such need. They were both denied for Respondent " . . . failed to demonstrate and establish sufficient need to conduct discovery proceedings . . . " Pet.Writ.Cert., Exhibit S, App. 121; page 106. There are no reported cases on either N.M.R.A.17-311 (2006) or (2008). The New Mexico Supreme Court has announced no criteria for either "a showing of need" under the superceded rule or a "showing of good cause" of the current rule.

The Committee Chair was asked to explain his ruling on the record as to how the burden of showing need is to be met for the purposes of appellate review. He refused to do so.

Articulated Notice of Violation of Court Order Is Required.

Respondent claims Due Process notice is adequate and meets Constitutional muster when the subject order is "referenced and identified" in the

charging document without any statement that its violation is the basis for discipline. Br.Opp. page 6. This ignores *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

This untenable position is a basis for this Court to Order a summary disposition of the Petition under Sup.Ct.Rule 16.1.

Extraordinary Writ.

Respondent cites Petitioner's Petition for Extraordinary Writ. Br.Opp. pages 7-8, Exhibit M, App. 111. Respondent claims it was filed " . . . after several days of hearing but before the hearing was concluded." Br.Opp. page 7. The Exhibit refutes this claim.

The Petition for Extraordinary Writ was served on July 15, 2006. Br.Opp., Exhibit M, App. 111 at 119. The first day of the evidentiary hearing was August 28, 2006. Br.Opp. page 6.

The assigned disciplinary case number on the matter at bar is 02-2006-***505***. Br.Opp., Exhibit E, App. 27 (Specification of Charges, emphasis supplied.) The Petition for Extraordinary Writ was directed to another case: 02-2006-***507***. Br.Opp., Exhibit M, App. 111 at 113, emphasis supplied.[2] Similar denial of

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[2] Petitioner admits history with both the New Mexico Supreme Court and its Office of Disciplinary Counsel, *e.g.*, Petitioner was successful in changing unconstitutional lawyer

(Continued on following page)

discovery was suffered in this other case. The Petition for Writ was denied. When this other disciplinary hearing commenced, the complaining witness gave testimony conflicting with a statement she had previously sworn to, thus undermining the prosecution. The case was settled and dismissed.

Petitioner's Web Site.

Respondent claims copies of Petitioner's Web Site were introduced without objection. Br.Opp. page 9. Raising the First Amendment as a shield against the Web Site materials introduced is a valid objection preserving appellate review. Pet.Writ.Cert. pages 8 and 9 with citations to the record. *See, Konigsburg v. State Bar of California*, 353 U.S. 252, 258, 77 S.Ct. 722, 725-26, 1 L.Ed.2d 810 (1957) (claiming, generally, the actions of the bar committee was an unconstitutional violation of applicant's First Amendment rights is adequate for federal question jurisdiction where California Supreme Court considered and rejected the argument.)

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advertising rules in New Mexico. *See, Stein v. Disciplinary Board of the Supreme Court of New Mexico*, 520 F.3d 1183, 1886 (10th Cir. 2007) (Mr. Stein and his firm have apparently won a long struggle over the application of state disciplinary rules to their advertising. . . .)

Evidence: Surprise/Not Surprise.

Respondent at pages 12 and 13 of the Brief in Opposition notes Petitioner was not "surprised" at the content of the Specification of Charges or the evidence presented. That is not the issue. Knowledge of an Order entered is ***not*** notice that Petitioner was charged with its violation since it was not articulated in the Specification of Charges. The New Mexico Supreme Court acknowledged Petitioner's problem. Pet.Writ.Cert., Exhibit A, App. 1 at 33-34, *In the Matter of Stein,* 2008-NMSC-013, 177 P.3d 513, ¶ 59. Yet, two months after Petitioner was disbarred, the issued Opinion adopt Respondent's position that Petitioner " . . . was barred from collaterally attacking the orders ***he was charged with violating***." *Id.* at ¶ 53, App. 30, emphasis supplied. *See also, id.* at ¶ 64, App. 37.

RESPONDENT'S REASONS TO DENY WRIT.

Respondent cites *Theard v. U.S.*, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) that Petitioner's Web Site was only used as evidence that Petitioner did not acknowledge that his conduct was wrongful, " . . . thus to assess whether he might engage in the conduct again." Br.Opp. page 15. The Opinion did not use the Web Site for this purpose. *See*, Section I., A below.

Further the Web Site was not included in the Specification of Charges as a factor in aggravation. Pet.Writ.Cert., Exhibit BB, App. 194 at 204-205. The written findings of Petitioner's violations were issued by the Hearing Committee on March 9, 2007. No

supplement to the Specification of Charges giving adequate notice that Respondent was adding the Web Site as a factor in aggravation prior to the Aggravation and Mitigation Hearing of April 2, 2007 was accomplished.

I. DUE PROCESS RIGHTS WERE INFRINGED.

The Specification of Charges gave no notice that Petitioner was being charged with violation of a court order as a reason for disbarment; what facts constituted the conflict of interest for Petitioner's disbarment; and what facts constituted misrepresentation to the two federal courts for which he was disbarred.[3] There was no notice in the Specification of Charges as to the existence of any " . . . duty to inform the court and interested parties in the guardianship and conservatorship proceeding of the filing of the federal lawsuits . . . " for which he was disbarred. *See, In the*

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[3] The opinion found that " . . . Respondent never notified the federal courts of the pending guardianship and conservatorship proceeding." *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 31. Pet.Writ.Cert., Exhibit A, App. 1 at 17. Yet, in both Complaints, the guardianship and conservatorship case was clearly mentioned or referenced in attachments with the style of the case and a state case number. Pet.Writ.Cert., Exhibit BB, App. 194.

Matter of Stein, 2008-NMSC-513, 177 P.3d 513, ¶ 36, Pet.Writ.Cert., Exhibit A, App. 1 at 20.

The Specification of Charges contained no proper or adequate notice of any charges for which Petitioner was ultimately disbarred.

A. Objection to Admission of Web Site Preserved Review.

The Constitutional objection to the introduction of Petitioner's Web Site was discussed above. *See,* page 6, above.

The New Mexico Supreme Court Opinion's reference to the Web Site notes Petitioner's displeasure with the Disciplinary Board. Pet.Writ.Cert., Exhibit A, App. 1 at 40. *In the Matter of Stein,* 2008-NMSC-013, 177 P.3d 513, ¶ 71. Expressing displeasure with government is protected core political speech and cannot be used to impose a punishment. *See, Hartman v. Moore*, 547 U.S. 250, 256, 126 S.Ct. 1695, 1701, 164 L.Ed.2d 441 (2006).

B. Petitioner Was Not Aware of Charges: They Were Not Articulated in the Specification of Charges.

Respondent claims adequate notice of charges arising from violations of a court Order:

> . . . Petitioner was put on notice of the Rules of Professional Conduct that are implicated when an attorney violates a court Order.

> (*See,* Specification of Charges ¶ 48.d attached as Exhibit E). Petitioner's argument is logically flawed since there was no finding or conclusion of violation of a court's Order that was a basis of Petitioner's discipline.

Br.Opp. page 20. Yet the Opinion of the New Mexico Supreme Court held that Petitioner " . . . intentionally violated the plain terms of Judge Vanzi's order . . . " in accepting the recommendation of disbarment. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 63, Pet.Writ.Cert., Exhibit A, App. 1 at 37. *See* Evidence: Surprise/Not Surprise at page 7, above.

The Specification of Charges makes no claim that Rules of Professional Conduct are implicated when an attorney violates a court Order. There is no mention in ¶ 48.d that a violation of N.M.R.A.16-109(A) of the New Mexico Rules of Professional Conduct occurred because Petitioner violated a court order. Br.Opp. page 20. There is no description of what claimed facts rise to a conflict of interest in the Specification of Charges. Pet.Writ.Cert., Exhibit BB, App.194.

The Order finding Petitioner had a conflict of interest was not to be used as collateral estoppel. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 53. Pet.Writ.Cert., Exhibit A, App. 1 at 30.

C. Specification of Charges Fails to Allege Misrepresentation and Fraud.

This section of the Brief in Opposition cites no authority. Br.Opp. pages 21-22. Reference to ¶¶ 34-36,

44 and 45 of the Specification of Charges to say that Petitioner was put on notice of the misrepresentations fails to recognize that there was no allegation of a duty outlined in those paragraphs.[4]

The duty to notify federal courts of the rulings in the state court was created from whole cloth in the Opinion without citation. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 36, Pet.Writ.Cert., Exhibit A, App. 1 at 20. Failure to place Petitioner on notice of this charged transgression was a Due Process violation. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

The conclusion of the New Mexico Supreme Court in ¶ 46 of the Opinion that the rules of professional conduct were stated with specificity is of no moment. Br.Opp. page 22. Listing all Rules of Professional Conduct alleged to be violated in one paragraph is not adequate notice when no particular rule is connected to particular conduct.

D. No Discovery Tools Were Available.

Respondent claims that Petitioner failed to show he needed discovery. Br.Opp. page 23. Not being surprised by factual evidence is not notice as to a theory of what facts constitute a claimed violation of

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[4] This also ignores the fact that the Federal Court was, in fact, told of the state court's ruling by the attorney for the Guardian and Moody Bible. Petitioner, by losing the race to the federal courthouse, was disbarred.

a Rule of Professional Conduct. Interrogatories requesting what acts of Petitioner constituted violation of each claimed Rule of Professional Conduct would have clarified the issues for hearing. Each claimed violated rule, like a criminal statute, has specific elements that need to be proved.

E. Standard of Proof: Preponderance or Clear and Convincing.

This disbarment case is not, as Respondent claims, " . . . akin to an employment claim which traditionally uses the preponderance of the evidence standard." Br.Opp. page 26. Failure to apply the correct burden of proof is recognized as fundamental federal constitutional error in particular matters implicating the Fifth and Fourteenth Amendments. *See*, in the criminal context, *Neder v. U.S.*, 527 U.S. 1, 7, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999), citing *Arizona v. Fulminante*, 499 U.S. 299, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (noting structual defects in the constitution of the trial mechanism.)

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) does apply. "This court has mandated an intermediate standard of proof – clear and convincing evidence – [as a matter of Due Process] when the individual interests at stake in a state proceeding are both 'particularly important' and more substantial than the mere loss of money." *Statosky v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388, 1396, 71

L.Ed.2d 599 (1982) (severing parental rights) quoting *Addington*.

Application of the incorrect burden of proof is fundamental constitutional error in this cause.

II. PETITIONER'S FIRST AMENDMENT RIGHTS WERE IMPLICATED.

When Petitioner claimed his First Amendment right to write and publish a Web Site when copies of the Web Site were being introduced below, it was an objection as to their admission.

Wisconsin v. Mitchell, 508 U.S. 476, 489, 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436, 447 (1993), cited by Respondent is not on point. Br.Opp. page 26. The New Mexico Supreme Court concluded the content of the Web Site expressed disdain, contempt and displeasure towards the Disciplinary Board as a factor in aggravation. *In the Matter of Stein*, 2008-NMSC-513, 177 P.3d 513, ¶ 71, Pet.Writ.Cert., Exhibit A, App. 1 at 40. There is no connection that the Web Site content showed motive for, or actual violation of, any Rule of Professional Conduct as outlined in *Wisconsin*.

Protected speech cannot be used as a basis for official reprisal to aggravate punishment. *Crawford-El v. Britton*, 523 U.S. 574, 188 S.Ct. 1584, 140 L.Ed.2d 759 (1998) and *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006).

Likewise, *In re Kramer*, 282 F.3d 721 (9th Cir. 2002) is not on point. Br.Opp. page 27. Mr. Kramer was quoted in an article in *Lawyers Weekly USA* using crude street language to describe the charges against him and to admit he was willing to risk breaking the rules. *Id.* at 726, fn. 2. No statements remotely similar to Mr. Kramer's are attributed to Petitioner.

Using Petitioner's Web Site as done by New Mexico was a violation under the First and Fourteenth Amendments.

CONCLUSION

On the basis that the Specification of Charges did not adequately place Petitioner on notice as to the charges he was facing, this Court should, in the alternative,

A. Issue a summary disposition on the merits under Sup.Ct.Rule 16.1 to reverse the New Mexico Supreme Court and order the reinstatement of Petitioner to the State Bar of New Mexico based on *Ruffalo* violations, or

B. Grant the Petition for Writ of Certiorari and have the Clerk of the Court schedule this cause for full briefing.

Respectfully submitted,

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APP. FF

[LOGO]

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[Address And Telephone Number Omitted In Printing]

October 14, 2005

Joel L. Widman, Esq.
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Re: Complaint of Hon. Linda M. Vanzi
Your Letter of October 12, 2005

Dear Mr. Widman:

At no time during the three hearings before Judge Vanzi in Case No. PQ-2005-00063 concerning Bruce C. Clinesmith in which this writer was involved was any sworn, live testimony presented before Judge Vanzi. No person adverse to this writer or his clients was ever subject to cross examination.

The fact that Judge Vanzi did not like the positions that this office took on behalf of clients in filed motions in her court is of no moment. Her job is to rule on the motions and enter orders accordingly.

Judge Vanzi is entitled to her opinion of the two federal cases filed by this office that concern the Clinesmiths. I disagree with her conclusions based on her incomplete out-of-court examination of the federal filings.

If Judge Vanzi felt that any actions of this writer were in violation of any order entered by the court, a Motion for Contempt should have been filed by the other attorneys in the case or Judge Vanzi should have issued her own Order to Show Cause why this writer should not be held in contempt. No attorney filed any such motion and Judge Vanzi did not issue any Order to Show Cause. When Judge Vanzi expressed her displeasure that I visited with Mr. Clinesmith without notice to any other persons or the court, as noted in her complaint letter, she entered an Order enjoining me from having any contact with Mr. Clinesmith. I have obeyed that Order.

If Judge Vanzi felt that her Order of August 5, 2005 somehow prohibited my actions with Mr. Clinesmith prior to the hearing of August 22, 2005, she should have held me in contempt – as noted above – and the Order of August 29, 2005 enjoining any further contact with Mr. Clinesmith by this writer or any member of this firm would have been unnecessary.

Mr. and Mrs. Clinesmith retained this office to represent both of their united interests in the guardianship case. Judge Vanzi seems not to understand that one suffering with dementia does not mean one cannot articulate their wants, desires and understand the need for and selection of an attorney for representation in court and for changing the testamentary disposition of their property. Further, having a diagnosis of dementia one can still understand that he or she and their spouse can have identical interests and goals for which only one attorney need be retained.

If it is now the position of your office that an attorney should disregard the expressed wishes of a client who may be suffering from dementia, please speak to Ms. Sally Scott-Mullins in your office.

It was Judge Vanzi's actions as a sitting District Judge on the Clinesmith case that were reprehensible and raises substantial questions as to her fitness for office. Here are just two examples:

First: Judge Vanzi complains about the motion filed on behalf of Mr. and Mrs. Clinesmith to open the hearing. I was representing Mr. Clinesmith when that motion was served and filed. This was done according to statute as quoted by Judge Vanzi. Quite to the contrary, it was Judge Vanzi who, upon denying the motion to open the hearing, let her friend Nancy Oriola, a principal of Decades, LLC into this "closed hearing" prior to appointing Decades, LLC as the temporary guardian and conservator of Mr. Clinesmith. This was in violation of the same statutes she quotes in her complaint letter.

Second: Judge Vanzi seems to have no concept of elemental Due Process under either the United States or New Mexico Constitutions. She entertained motions on short notice filed by parties adverse to clients represented by this writer. In fact, at the hearing of August 22, 2005 she ruled upon motions filed by parties adverse to this writer and his clients on less than two hours notice.

You should also be informed that in light of the above, as required by Rule 16-803.B of the Rules of Professional Conduct, this writer has been preparing a detailed complaint about Judge Vanzi to the Judicial Standards Commission. It will be filed upon completion.

Your office should allow the Court of Appeals to deal with all of these issues. This complaint should be dismissed.

Yours very truly,
THE STEIN LAW FIRM

by /s/ Stuart L. Stein
Stuart L. Stein

APP. GG

17-310. Answer.

A. **Contents.** The answer of the respondent-attorney shall contain the following:

(1) a brief and plain statement by the respondent reflecting his admissions, denials and any other relevant and material matter that he wishes to convey concerning each of the factual charges against him;

(2) any matter in mitigation in connection with any admitted violations; and

(3) the names and addresses of the witnesses that the respondent proposes to call in his defense.

B. **Filing and service.** Within twenty (20) days after service of the specification of charges, the respondent-attorney may file an answer to the charges. The answer shall be filed with the chairman of the hearing committee. Copies shall be served upon the members of the designated hearing committee and opposing counsel. Service may be by mail.

C. **Failure to answer.** If the respondent-attorney fails to answer the charges within twenty (20) days, in accordance with Paragraph B, or if the charges are not specifically denied in the answer, the charges will be deemed admitted. In this event, the sole issue to be determined by the hearing committee shall be the nature of the committee's recommendation to the Disciplinary Board after consideration of

any facts in aggravation or mitigation of the respondent-attorney's misconduct.

[As amended, effective May 1, 1986.]